BOOK REVIEWS

HANDBOOK OF THE LAW OF TORTS, by H. Gerald Chapin, LL. M., Professor of Law in Fordham University and in New Jersey Law School. (St. Paul: West Publishing Co., 1917, pp. xiv, 695.)

The above named Handbook belongs to the Hornbook Series of textbooks issued by the West Publishing Co., and it conforms to the general plan of the Hornbook text.

Professor Chapin is to be congratulated on having produced, in our opinion, the best Hornbook that has appeared on any subject, with the possible exception of Clark on Contracts, which has heretofore been easily first in this series.

Professor Chapin's book exhibits scholarship as well as learning, acquaintance with the latest authorities, willingness to tackle unsettled questions, and ability to discuss them with acuteness and legal discrimination. His style is excellent, terse but lucid, and easily intelligible to the tyro in the study of law. It is remarkable how much matter the author has managed to incorporate in his text and notes, without undue compression, and without a sacrifice of clearness. It is a real achievement.

The writer of this review has used in the classroom, as textbooks on the law of torts, Bigelow on Torts, Pollock on Torts, and Cooley on Torts (Students' Edition). He is convinced, however, after careful study of Chapin on Torts, that it is better suited for the instruction of students, under the combination method of teaching by textbook and casebook, than any one of the leading authorities above named. Without disparaging these standard treatises, it may be said of Professor Chapin's work, in addition to its intrinsic merits as already indicated, that it is an American book, and not an English book with American notes; that it is written by a teacher for students; and that it is not a composite text, partly by the author and partly by the editor.

In a review of Professor Chapin's book in the *American Law Review*, the opinion is expressed that, "The work is a little small for general use in the law schools without some supplementary work." While not concurring in this view when a satisfactory casebook accompanies Professor Chapin's text, it is undoubtedly true that the book would be improved by the addition of some topics, and a fuller treatment of others.

As Professor Chapin's work will certainly go to a second edition, we venture to suggest that space might be obtained, if desired, by the omission of some topics which, while concerned with the law of torts, are usually taught elsewhere. The writer of a textbook for law schools should not feel obliged to round out his subject with logical fullness, but should exclude all topics which would probably be omitted by a teacher of torts in order to avoid duplication.

As examples of such topics in Professor Chapin's book we would

mention the Statute of Limitations (pp. 127, 131); Corporations (pp. 198, 208); Conflict of Laws (pp. 240-252); Waste (pp. 389-393). The omission of these topics would give space for fuller treatment of Death by Wrongful Act (referred to on pp. 32, 38, 244); Employers' Liability Acts (referred to on pp. 40, 194, without mention of the Federal Statutes); Lateral and Subjacent Support of Land and Houses (referred to on p. 43, and briefly treated on pp. 516, 517); Nuisance to or from Water (referred to on pp. 69, 578).

With great deference, we call attention to three topics in regard to which it is thought that Professor Chapin's statement of the law is imperfect.

1. Ancient Lights. On page 48 the repudiation in the United States of the English doctrine of Ancient Lights is ascribed to the difference between conditions prevailing in America and in England—to the fact that such a doctrine "cannot be applied to the growing cities and villages of this country without working the most mischievous consequence," quoting Bronson, J., in *Parker* v. *Foote*, 19 Wend. (N. Y.) 309, 319.

But Judge Bronson had already explained, in a classical passage often quoted, "that there is no principle upon which the modern English doctrine on the subject of lights can be supported," and had denounced it as "an anomaly in the law." His reason was that the right to maintain ancient lights must rest on prescription, i. e., adverse use for twenty years, and the use in the case of windows, in a house on a man's own land, is not adverse. In the language of Bishop (Non-Contract Law, Sec. 924): "Since one whose land is overlooked from the land of another has no right of action against him, it follows that, upon the ordinary principle of prescription, the owner of a house, with windows opening upon grounds of another, cannot forbid his building up against them, however long the house has stood." This reasoning is identical with that of Gray, C. J., in *Gilmore* v. *Driscoll*, 122 Mass. 199, denying that lateral support of buildings can be acquired by prescription, quoted by Professor Chapin on p. 515, and is of course familiar to him as applicable to ancient lights. We think it would have been better to ascribe the American rejection of ancient lights to sound legal principle, as at least a coöperative reason, rather than to base it entirely upon the argument *ab inconvenienti*.

2. *Booth* v. *The Rome, etc., R. Co.*, 140 N. Y. 267. The decision in this case (followed in *Holland House Co.* v. *Baird*, 169 N. Y. 136) is stated incidentally by Professor Chapin on p. 350; and this, as far as we can find, is the only reference to the important doctrine, laid down therein, that, in the absence of negligence, no action lies for injury done, while blasting, to a building on adjoining premises by mere vibration and concussion; and no hint is given that this doctrine was challenged as soon as proclaimed in New York and has since, upon one ground or another, been repudiated in a number of cases *Hickey* v. *McCabe* (1910), 30 R. I. 346 (27 L. R. A. [N. S.] 425, 19 Ann. Cas. 783); *Patrick* v. *Smith* (1913), 75 Wash. 407 (48 L. R. A. [N. S.] 740);

Louden v. *Cincinnati* (1914), 90 Ohio St. 144 (Ann. Cas. 1916C, 1170); *Wilson* v. *Mississippi River, etc., Co.* (1916) (Iowa), 156 N. W. 188. But the New York doctrine is followed in Alabama in *Bessemer Coal, etc., Co.* v. *Doak,* 152 Ala. 166 (12 L. R. A. [N. S.] 389), and in other cases.

It would seem that the New York doctrine in the Booth case, and the dissent therefrom elsewhere, should have been stated when *Hay* v. *Cohoes Co.,* 2 N. Y. 159, was cited on page 58, or on page 346, or on page 515, in connection with the universally accepted doctrine that, in the absence of negligence, there is liability when stones, earth, etc., are thrown by blasting on adjoining premises.

The doctrine of the Booth case has now, it seems, become a minority doctrine. See Ann. Cas. 1916C, note, p. 1176, where it is said: "The trend of the majority of the recent decisions on the question is toward the rule that a person causing blasting to be done is liable for injuries to the property of another caused by concussion or vibration therefrom, irrespective of the question of negligence, and although there is no actual physical invasion of the property thus injured."

3. Dogs doing injury on the premises of the plaintiff. On p. 347, note 7, Professor Chapin distinguishes dogs from cattle by declaring: "If a dog enters without the consent of his master, it is no trespass;" but "an unwarranted entry by cattle is a trespass, and the owner is responsible irrespective of the care he exercises in endeavoring to keep them at home." This distinction is of the utmost importance, not only as to the trespass itself upon the land in the possession of the plaintiff, but by reason of the doctrine that, if the plaintiff can regard the animal as a trespasser, and sue its owner in trespass *quare clausum fregit,* he can also hold the owner liable, by way of aggravation of damages, for any injury the animal may inflict on the plaintiff or on his property, as by biting, goring, kicking, etc., and this without proof of the owner's negligence or of his knowledge of the vicious propensity. In *Decker* v. *Gammon,* 44 Me. 322, a recovery was had for injury to the plaintiff's horse on his premises by the defendant's horse while trespassing, without proof of the *scienter,* in an action on the case brought directly for the value of the horse. It was objected by counsel for the defendant that the action should have been trespass *quare clausum fregit,* and that the value of the horse could be recovered in that action only, in aggravation of damages. On appeal the court refused to reverse the judgment and sustained the declaration as sufficient, though not technically for trespass *quare clausum fregit.*

No other case has been found where the plaintiff, without proof of the *scienter,* recovered for injury done by an animal otherwise than in trespass *quare clausum fregit,* and on the theory of aggravation of damages. It is to be observed, however, that the plaintiff in *Decker* v. *Gammon* was in possession of the premises, and could have brought trespass *quare clausum fregit* for the injury done by the trespassing horse had he been advised to do so.

The general doctrine is well established as to horses, cows, etc. The question is, does it extend to dogs? This depends on two considerations, (1) whether the dog is a trespasser; and (2) whether the plain-

tiff has such possession of the premises where the injury occurs as enables him to sue the owner of the dog in trespass *quare clausum fregit.*

(1) It is settled that if the owner of the dog trespasses, and the dog while on the land with his owner, though unbidden, and against his master's will, does mischief, the action of trespass *quare clausum fregit* will lie against the owner of the dog (if the plaintiff is in possession of the land); and the owner is liable, by way of aggravation of damages, for all the injury he does, without proof of the *scienter.* But suppose the dog enters the plaintiff's premises alone, not in company with his master, and without his knowledge or consent, is the dog still a trespasser, and is his owner liable for injury by him to the plaintiff or his property, without proof of the *scienter?*

As to this, Professor Chapin says (p. 347, note 7): "So if the dog alone trespass, and in fact do damage, proof of *scienter* is unnecessary in an action brought by the owner of the close. The ground of liability here rests on the breach of the close, and the damage is alleged by way of aggravation." But does "the dog alone trespass?" It seems hard to reconcile this supposition with Professor Chapin's previous statement (p. 347, n. 7): "If a dog enters without the consent of its master, it is no trespass;" or with the following statement, in the same note qualifying the above: "Yet if the owner trespass, and while on the land the dog, unbidden and against his will does mischief, that action [trespass *qu. cl. freg.*] will lie for the injury"—meaning, of course, without proof of the *scienter.*

The importance of the question, whether a dog entering a close alone, without the knowledge or consent of its owner is a trespasser, with onerous consequences to his master, is such as to justify an examination of the authorities.

Looking first to the English authorities, we find that in *Read* v. *Edwards,* 17 C. B. (N. S.) 245 (from which Professor Chapin on p. 347, note 7, quotes the reasons which have been assigned why a dog alone does not trespass) it was declared by Willes, J., that it was unnecessary to decide the question, "whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another as in the case of an ox," because in *Read* v. *Edwards* the *scienter* was proved. And in Pollock on Torts (Webb's edition) the author declares that the question asked by Willes, J., in *Read* v. *Edwards* remains undecided in England, though the learned author expresses the view that the better opinion seems to favor the negative answer.

In the United States, we find that of the cases cited by Professor Chapin for his statement: "If the dog alone trespass, and in fact do damage, proof of the *scienter* is unnecessary in an action brought by the owner of the close," *Chunot* v. *Larson,* 43 Wis. 336, is alone in point. In two of the other three cases cited there was no injury done by a dog (by a sow in *Van Leuven* v. *Lyke,* 1 N. Y. 515; by a horse in *Decker* v. *Gammon,* 44 Me. 322). In the third case, the dog was with his owner in the public street, unmuzzled and unleashed, in violation of a city ordinance. *Buchanan* v. *Stout,* 123 N. Y. S. 724.

Chunot v. *Larson, supra,* does undoubtedly fully sustain Professor

Chapin's statement and is based on the assumption that in the matter of trespass there is no difference between dogs and other animals, Ryan, C. J., dissenting. But this decision, by a divided court, is treated by the textwriters as standing alone. Thus Bishop (Non-Contract Law, § 1238), says: "One of the advantages of owning an ordinarily disposed dog, instead of a horse, appears to be, while the horse owner must use care (Bishop rejects the doctrine of absolute liability) to keep his animal from injuring a neighbor by trespass, the dog owner is under no corresponding duty. So long as the dog avoids getting a bad name, its owner, unlike the horse owner, escapes all obligation to pay for the mischief it does, if suffered to wander without its master abroad. But if the master is present, himself trespassing, he must pay as well for the dog as for himself." He adds to his citation of authorities: "But see the majority opinion in *Chunot* v. *Larson,* in 43 Wis. 536." The same view of *Chunot* v. *Larson,* as standing alone, is taken in 1 Ruling Case Law 1118; and in the case note 25 L. R. A. (N. S.) 692.

(2) Possession by the plaintiff of the premises where the injury occurs. On page 347, note 7, end, Professor Chapin says: "In *Sanders* v. *Teape,* 51 L. T. Rep. (N. S.) 263, proof of the *scienter* was deemed requisite, but it does not appear that the plaintiff was owner of the close." In 10 Mews Digest 102 there is a full statement of the facts of this case, and it appears that the plaintiff, when injured by the dog, which leaped over the fence upon him, was not the owner of the premises, but a laborer engaged in digging a hole, who did not have such possession as would enable him to maintain trespass *quare clausum fregit,* and it was held that without proof of the *scienter* the plaintiff had no cause of action.

In *O'Connell* v. *Jarvis,* 43 N. Y. S. 128, the question was mooted whether a dog was a trespasser like horses and other animals, but it was not decided, the court saying: "Here the plaintiff did not own the premises. He had the right to be upon them as the child of his father, and under his protection. The plaintiff therefore, has no substantive cause of action to which to annex the aggravation of damages caused by the bite of the dog." And see *Buck* v. *Moore,* 35 Hun. 338, where the court said (the action being for the death of the plaintiff's dog upon the plaintiff's premises): "It must be noticed in the outset, that the action is not for trespass on the plaintiff's close aggravated by the mischief done thereon, but simply for damages sustained by the death of the dog;" and it was held the defendant was not liable when her dog, following her along the street, ran into an adjoining yard and there seized and killed the plaintiff's dog, there being no proof of *scienter.*

The doctrine that the owner of horses, cows, swine, etc., though ignorant of their propensity to do injury to human beings or to domestic animals, is nevertheless liable for all the harm they do while trespassing on premises in the possession of the plaintiff, without proof of the *scienter* or of negligence, is harsh and technical, and it is believed has not yet been extended to dogs outside of Wisconsin, and

it is submitted that it should not be. The doctrine of aggravation of damages bears too heavy a burden already, when the mere entry of a horse or cow into a neighbor's field makes the ignorant and non-negligible owner liable, for perhaps hundreds of dollars, for the death of a valuable animal or for injury to a human being. To extend this doctrine to roving dogs would be to add sorrow to sorrow. If it is expedient to abolish the *scienter* as to dogs, in whole or in part, let it be done by statute.

Besides the technicality of allowing the doctrine of aggravation of damages to set aside the doctrine of *scienter,* another technicality is added (this time, however, in favor of the owner of the injuring animal) that unless trespass *quare clausum fregit* will lie against the owner of the animal he is not liable for the injury done by it. The extraordinary result follows, as we have seen, that while one in possession of land can recover for injury done to him by an animal on his premises, without proof of the *scienter,* his son or servant, though injured at the same time, has no right of action for want of possession, without which trespass *quare clausum fregit* will not lie.

CHARLES A. GRAVES.

University of Virginia.